

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

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APPLICATION TO CHANGE WATER RIGHT NO. 76H 30148403 BY YC PROPERTIES, LLC	}	PRELIMINARY DETERMINATION TO GRANT CHANGE
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On May 1, 2020, YC Properties LLC (Applicant) submitted Application to Change a Water Right No. 76H 30148403 to change Beneficial Water Use Permit No. 76H 15711-00 to the Missoula Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website on May 4, 2020. The Department sent Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated October 22, 2020. The Applicant responded with information dated December 10, 2020. The Application was determined to be correct and complete as of September 30, 2022. An Environmental Assessment for this Application was completed on February 1, 2023.

INFORMATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application to Change Water an Irrigation Right, Form 606-IR
- Place of Storage Addendum (Form 606-PSA)
- Attachments
 - Appendix A – Project Maps & Aerial Findings Index
 - Appendix B – Site Visit Photo Plates & Maps
 - Appendix C – Water Right Abstracts
 - Appendix D – Manning’s Equation Worksheets
 - Appendix E – Painted Rocks Water Users Association Records
- Maps:
 - 2017 NRIS Aerial Photo Depicting Claimed Place of Use and Supplemental Rights
 - 2017 NRIS Aerial Photo Depicting Claimed Place of Use and Point of Diversion

- 2017 NRIS Aerial Photo Depicting Claimed Point of Diversion, Conveyance, and Place of Storage
- 2017 NRIS Aerial Photo Depicting Proposed Project
- Aerial Photos from 1979, 1982, 1990, 1995 Depicting Historical Irrigated Acreage

Information Received after Application Filed

- Response to Deficiency Letter dated December 7, 2020, and received by the Department on December 10, 2020
- Waiver of Statutory Timeline Received on January 25, 2023

Information within the Department's Possession/Knowledge

- DNRC surface and groundwater right records
- 1958 Ravalli County Water Resources Survey maps, field notes, and aerial photos
- Montana Cadastral parcel and property information
- Application materials for pending Change Application Nos. 76H 30148402, 76H 30148404, and 76H 30158433
- Department Technical Report dated September 30, 2022
- DNRC Environmental Assessment, dated February 1, 2023

The Department also routinely considers the following information. The following information is not included in the administrative file for this Application but is available upon request. Please contact the Missoula Regional Office at 406-721-4284 to request copies of the following documents.

- DNRC Historic Diverted Volume Standard Methodologies Department Memo, dated September 13, 2012
- DNRC Consumptive Use Methodology Memo, dated March 17, 2010
- DNRC Consumptive Use and Irrecoverable Loss Memo, dated April 15, 2013

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, part 4, MCA).

WATER RIGHT TO BE CHANGED

FINDINGS OF FACT

1. The Applicant is proposing to change Provision Permit (Permit) No. 76H 15711-00. The permit has a flow rate of 500 gallons per minute (GPM) and a diverted volume of 201.6 acre-feet (AF) from Sawdust Creek for the purpose of fish and wildlife and sprinkler irrigation with a priority date of October 17, 1977. The period of use is January 1 to December 31 for fish and wildlife and April 15 to October 15 for irrigation. The period of diversion is January 1 to December 31 annually. The place of use for sprinkler irrigation is 5 acres located in the SENW of Section 35, T6N, R21W, Ravalli County approximately 1.5 miles west of the town of Hamilton.
2. On November 18, 2005, the Department issued Change Authorization 76H 30012733 which allowed the purpose of Permit 76H 15711-00 to be changed from commercial to fish and wildlife and changed the place of use from historical beaver rearing pens to three existing reservoirs (Reservoir No. 1 on Sawdust Creek, Reservoir No. 2, and Reservoir No. 3). The Department certified the change authorization on January 23, 2007, and reissued it with corrections made to the legal land description of historic Reservoir No. 1 on December 24, 2019. When the 2005 change authorization was coded in the DNRC water rights database the dam across Sawdust Creek was not entered as a diversion. This was incorrect, as an onstream dam would be considered a primary diversion and should have been listed as such on the water right abstract post change authorization. Additionally, there was no discussion of the irrigation pump or irrigation in general with the 2005 change application materials. This application only focused on the change in water use from the commercial beaver pens to the three fish and wildlife ponds. The proper coding of the 2005 change authorization should have included the onstream dam as a primary point of diversion and the 5 hp irrigation pump as a secondary point of diversion. Individual elements of the water right being changed are shown below in Table 1.

Table 1: Elements of Water Right Proposed for Change (Permit 76H 15711-00)

Purpose	Flow Rate	Volume	Period of Use	Point of diversion	Place of use	Place of Storage	Priority date	Acres
Fish and Wildlife Irrigation	500 GPM	201.6 AF	01/01 - 12/31 04/15 – 10/15	SESWNW of Sec 35, T6N, R21W	S2NE SWSENW NWNWNE NW of Sec 35 T6N, R21W	33.6 AF S2NWNWNE, 3.2 AF NWNWNE, 5 AF SWSENW, Sec 35, T6N, R21W	10/17/1977	5

CHANGE PROPOSAL

FINDINGS OF FACT

3. The Applicant is proposing to eliminate the on-stream 5 AF Reservoir No. 1, and to relocate Reservoir No. 3 from the NWNWNE of Section 35, T6N, R21W to a new location in the E2E2NW of Section 35, T6N, R21W, just west of existing Reservoir No. 2. The Applicant is also proposing to reconfigure Reservoir No. 2 to reduce the surface area from 3.5 acres to 3 acres. The relocated reservoir will be renamed Reservoir No. 1 and will be 0.59 surface acres and have a capacity of 2.36 AF. The reconfigured Reservoir No. 2 will have a capacity of 28.5 AF. Fish and wildlife water from Sawdust Creek will be conveyed to the new Reservoir No. 1 via an 8-inch pipeline before being conveyed to Reservoir No. 2 via an open earthen ditch. Water supplied by Permit 76H 15711-00 will continue to be used for fish and wildlife purposes in the two post-change reservoirs (Reservoir No. 1 and 2). The relocated Reservoir No. 1 will also result in a change in place of use for fish and wildlife in the E2E2NW of Section 35, T6N, R21W. Water for continued sprinkler irrigation of the 5-acre irrigation place of use will now be diverted from the concrete weir/sluicelox located between the headgate and the 8-inch pipeline with a 60-GPM, 5-HP pump. This relocation of the irrigation pump from the historical on-stream reservoir to the existing ditch/pipeline conveyance system results in an additional 60 gpm being diverted at the historical headgate to accommodate irrigation. After this change the total flow rate of water that will be diverted from Sawdust Creek via the headgate for both fish and wildlife and irrigation purposes is 210 GPM.

4. This change application is being processed concurrently with three other change applications as part of the Applicant's overall irrigation improvement project. Four separate change applications are required under the provisions of ARM 36.12.1901(7), because upon authorization of the proposed changes the sources, purposes, and places of use of the four subject water rights will not be identical. The overall project involves eliminating current Reservoir No. 1 on Sawdust Creek (covered by Permit 76H 15711-00 only), relocating a second 3.2 AF-capacity reservoir and reducing its size (current Reservoir No. 3, post-change Reservoir No. 1), and reducing the surface area and capacity of an existing third 33.6 AF capacity reservoir (Reservoir No. 2). Two of the three existing reservoirs (Nos. 2 and 3) were originally filled with groundwater diverted from wells issued under associated Permit 76H 72226-00 and surface water diverted from Sawdust Creek with Permit 76H 15711-00. On-stream Reservoir No. 1 was filled only with water diverted from Sawdust Creek with Permit 76H 15711-00. The Applicant's Canyon

Creek (Claim 76H 2508-00) and Barley Creek (Claim 76H 2509-00) irrigation water rights did not historically utilize storage. Post-change Reservoir Nos. 1 and 2 are being added to the Canyon and Barley Creek claims in pending Change Application Nos. 76H 30148402 and 76H 30158433. The purpose of the reservoir relocation and resizing project is to improve the irrigation infrastructure on the property by creating a centralized pumping reservoir for sprinkler irrigation (Reservoir No. 2). Proposed Reservoir No. 1 will perform the function of trapping sediment and debris before surface water diverted from Sawdust Creek with Permit 76H 15711-00 is conveyed to Reservoir No. 2. Both post-change reservoirs will also serve as a stock place of use for Permit 76H 72226-00, and irrigation water flow-through ponds (rather than true storage ponds) for Claim Nos. 76H 2508-00 and 76H 2509-00. The Applicant is not proposing to change the irrigation places of use for any of these water rights.

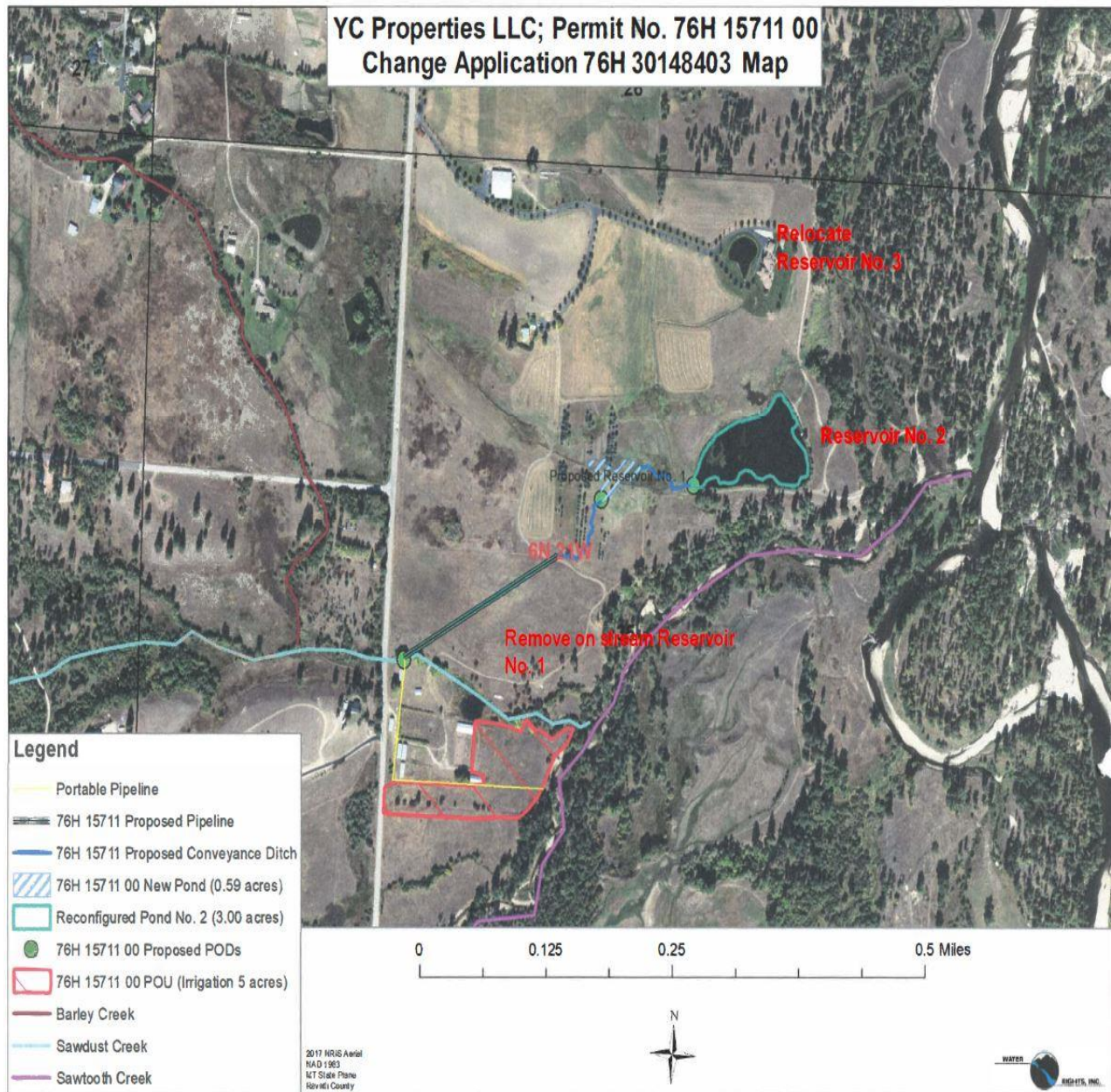
5. In addition, this change application proposes to change the Sawdust Creek point of diversion legal land description for Permit 76H 15711-00 only to correct it as the actual headgate diversion structure will not be moved. Historically water was diverted from a headgate on Sawdust Creek in the SWSENW of Section 35, T6N R21W, however the permit lists the location of the point of diversion as being in the SESWNW of Section 35. This incorrect legal land description was not corrected during certification of Permit 76H 15711-00, and the headgate has always been in the same location. Map 1 shows the proposed elements of this change.

6. No other water rights are considered supplemental to the water right being changed. Permit 76H 15711-00 is associated with Permit 76H 72226-00 because they share places of storage for two of the three reservoirs. The Applicant filed change applications for Permit 76H 72226-00 and Statement of Claim (Claim) Nos. 76H 2508-00 and 76H 2509-00, which are being processed concurrently with the subject application. Upon authorization of the proposed changes in water use of Permit Nos. 76H 15711-00 & 76H 72226-00 and Claim Nos. 76H 2508-00 & 76H 2509-00, all four water rights will be associated and have the same places of storage at Reservoir Nos. 1 and 2. The Applicant's associated water rights and corresponding change applications are listed in Table 2 below.

Table 2: Applicant's water rights and change applications

Water Right	Change Application submitted	Source	Type
76H 2508-00	76H 30148402	Canyon Creek	Statement of Claim
76H 2509-00	76H 30158433	Barley Creek	Statement of Claim
76H 15711-00	76H 30148403	Sawdust Creek	Provisional Permit
76H 72226-00	76H 30148404	Groundwater	Provisional Permit

MAP 1



CHANGE CRITERIA

7. The Department is authorized to approve a change if the applicant meets its burden to prove the applicable § 85-2-402, MCA, criteria by a preponderance of the evidence. Matter of Royston, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an applicant's burden to prove change criteria by a preponderance of evidence is "more probably than not."); Town of Manhattan v. DNRC, 2012 MT 81, ¶8, 364 Mont. 450, 276 P.3d 920. Under this Preliminary Determination, the relevant change criteria in § 85-2-402(2), MCA, are:

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

8. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. E.g., Hohenlohe, at ¶¶ 29-31; Town of Manhattan, at ¶8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

HISTORIC USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historic Use

9. Per Administrative Rules of Montana (ARM) 36.12.1902(1)(b), the historical information for a Provisional Permit must be described as it was used as of the date of Project Completion Notice filing. The Project Completion Notice for Permit 76H 15711-00 was received by the Department on September 14, 1979, and the permit was certified on July 21, 2005. An Application to Change a Water Right (76H 30012733) was authorized for 76H 15711-00 on November 18, 2005, and the Project Completion Notice for the authorization was received by the Department on December 28, 2006. On January 23, 2007, Change Authorization 76H 30012733 was certified for 150 GPM up to 189.1 AF, which was only the portion of the water right changed from the historical commercial beaver rearing to fish and wildlife in the three reservoirs.

10. The fish and wildlife purpose of the water right being changed was operated by diverting a flow rate of 150 GPM and volume of 189.1 AF of water from Sawdust Creek from a headgate located in the SWSENW of Section 35, T6N, R21W into an 8-inch pipeline that conveyed the water approximately 1,575 feet to Reservoir No. 2. Once the fish and wildlife portion of water reached the reservoir, it either remained in this reservoir or was secondarily pumped to Reservoir No. 3 to provide water for the permitted fish and wildlife needs for that reservoir. Fish and wildlife beneficial use also occurred in the on-stream 5 AF capacity Reservoir No. 1. This reservoir was created by constructing a dam across Sawdust Creek downstream of the headgate and pipeline used to supply water to Reservoir Nos. 2 and 3. No water diverted into the pipeline was used to fill on-stream Reservoir No. 1. According to information in the application materials, Sawdust Creek water that was not diverted through the headgate and pipeline was able to flow through the on-stream reservoir.

11. Historically irrigation water was diverted from Sawdust Creek via a 60 GPM, 5 hp pump was placed in the on-stream Reservoir No. 1 (proposed to be removed), which was considered a secondary diversion. A Department review of USDA aerial photo (photo # 179-70) dated 8/2/1979, found 5 acres historically irrigated using the subject water right. Review of this same aerial photograph also confirmed the existence of the three fish and wildlife reservoirs.

12. Flow rates were confirmed during certification of Change Application 76H 30012733 in 2007 to be 150 GPM diverted from the headgate for the fish and wildlife purpose, and 60 GPM diverted from the pump in Reservoir No. 1 for irrigation, for a total maximum historic flow rate of

210 GPM (150 GPM + 60 GPM = 210 GPM). The remainder of the flow rate on the water right, 290 GPM, ran through the on-stream pond and was never historically diverted from Sawdust Creek, as on-stream ponds are not assigned a flow rate (500 GPM – 210 GPM = 290 GPM). Based on this information the Department finds the maximum diverted flow rate for Permit 76H 15711-00 to be 210 GPM.

13. According to the Applicant, irrigation of the 5-acre historical place of use typically began on April 15 and ended on October 15. The Applicant elected to have the Department calculate historic consumptive use per ARM 36.12.1902(16). The historical method of irrigation was sprinkler irrigation, using handlines to distribute the water throughout the place of use. The weather station used for calculating historic consumptive use is the Hamilton weather station in Ravalli County, which represents a similar elevation and is the closest station to the place of use. The seasonal NRCS evapotranspiration (ET) Irrigation Water Requirement (IWR) for flood/sprinkler irrigation for the Hamilton weather station is 19.93 inches. Applying the Ravalli County management factor for 1973 to 2006 of 88.6% results in an adjusted ET IWR value of 17.66 inches or 1.47 feet. Based on this information, the historical crop consumptive volume not including irrecoverable losses for 5 irrigated acres is 7.4 AF (17.66 inches / 12 inches/foot x 5 acres = 7.4 AF).

14. The Department considered an on-farm efficiency of 70% for the historical handline sprinkler irrigated field. On-farm efficiency refers to the percent of water delivered to the field that is used by the crop. Applying an on-farm efficiency of 70% to the 7.4 AF crop consumptive use results in a historical field applied volume of 10.5 AF (7.4 AF / 70% = 10.5 AF).

15. For sprinkler irrigation, the Department assumes 10% of the field application volume is consumed through irrecoverable losses. These losses account for evaporation of water that is delivered to the field but not used by the crop. The Department finds an additional 1 AF of water consumed as non-crop related evaporative losses based on a field application volume of 10.5 AF (10.5 AF x 10% = 1.0 AF). The total historical consumed volume for the 5 acres is 8.4 AF (7.4 AF + 1.0 AF = 8.4 AF). Table 3 identifies the variables used by the Department in its historic use assessment of Permit 76H 15711-00.

Table No. 3 Historic Irrigation Consumptive Volume For 5 Acres

Ravalli County Flood/Sprinkler ET (Inches)	Ravalli County 1973-2006 Management Factor (Percent)	Historic Acres	HCV AF (minus IL)	On-farm Efficiency	Field Application AF	Historic Irrecoverable Losses (IL) sprinkler 10%:	HCV AF (Including IL)
19.93	88.6%	5.0	7.4	70%	10.5	1.0	8.4

16. Permit 76H 15711-00 also has historical consumptive use from evaporation losses on historical Reservoir Nos. 1 and 3. Evaporative losses from Reservoir No. 2 were provided by Permit 76H 72226-00. The Department calculated evaporated losses using the DNRC standard of 3.24 AF/acre based on Potts (1988). The surface area of on-stream Reservoir No. 1 that is being removed is 0.31 acres for an evaporated loss of 1 AF ($3.24 \text{ AF/acre} \times 0.31 = 1 \text{ AF}$). Reservoir No. 3 has 0.38 surface acres for an evaporated loss of 1.23 AF ($3.24 \text{ AF/acre} \times 0.38 \text{ acres} = 1.23 \text{ AF}$). Based on this information the Department finds the historic consumptive use from evaporated losses for Reservoir No. 2 are accounted for in Permit No. 76H 72226-00.

17. The Department finds the total historic consumptive use volume for Permit 76H 15711-00 to be 10.63 AF (8.4 AF irrigation + 1 AF Reservoir No. 1 + 1.23 AF Reservoir No. 3 = 10.63 AF)

18. Historic diverted volume for the fish and wildlife purpose was determined using water measurements for the amount of water diverted into Reservoir Nos. 1, 2, and 3 which were submitted to the Department during project completion per the water measurement condition on this permit. Based on the submitted water measurement reports, the maximum historic diverted volume for Permit 76H 15711-00 is 189.1 AF, as measured in 2005 prior to submittal of the Project Completion Notice for Change Authorization 76H 30012733. In the Project Completion Notice the Applicant stated that the full permitted volume was not put to beneficial use due to lower flows available in Sawdust Creek. The 189.1 AF volume measured by the Applicant did not include any water diverted for irrigation using the pump in historic Reservoir No. 1. This volume only represents what was diverted into the pipeline for fish and wildlife use in Reservoir Nos. 2 and 3. The total historical diverted volume is equal to the sum of the volumes diverted for the fish and wildlife and irrigation purposes, which equals 199.6 AF (189.1 AF fish and wildlife + 10.5 AF irrigation).

19. Per ARM 36.12.1902(10), historical diverted volume for irrigation is calculated by adding conveyance losses and field application volumes. Since water diverted using the secondary diversion (pump) was conveyed to the 5-acre place of use via a pipeline there were no

conveyance losses, and the field application volume is considered the historically diverted volume for irrigation, which is 10.5 AF.

20. The Department finds a maximum historically diverted flow rate, diverted volume, and consumed volume of 210 GPM, 199.6 AF, and 10.63 AF, respectively, for Permit 76H 15711-00.

FINDINGS OF FACT – Adverse Effect

21. The purpose of this change is to relocate Reservoir No. 3 from the NWNWNE of Section 35 to a new location in the E2E2NW of Section 35 T6N, R21W, and the renaming of this relocated reservoir to Reservoir No. 1. The Applicant also proposes to reconfigure Reservoir No. 2 by reducing the surface area from 3.5 acres to 3.0 acres. The pipeline that historically conveyed water from the headgate to Sawdust Creek to Reservoir No. 2 will be reconfigured to convey water directly into the new Reservoir No. 1 instead of Reservoir No. 2. The Applicant is not proposing to change the flow rate, diverted volume, or purpose for this water right. Rather, this application does seek to correct the point of diversion legal land description for the headgate historically used to divert Sawdust Creek water, and the place of use for fish and wildlife will change with the relocation of historical Reservoir No. 3 and removal of historical on-stream Reservoir No. 1.

22. Historically Permit 76H 15711-00 provided 150 GPM up to 189.1 AF of water for fish and wildlife purposes in Reservoir Nos. 2 and 3. This volume of water was authorized by the Department in 2004, and certified in 2007. This volume of water allows for multiple fills of the reservoirs and evaporative losses from historical Reservoir No. 3. The Applicant is proposing to continue to use this flow rate and volume in new Reservoir No. 1 and existing Reservoir No. 2 for fish and wildlife uses from January 1 to December 31 at a rate of 150 GPM up to 189.1 AF. Permit 76H 72226-00 also provided stock water in historical Reservoir No. 3 and existing Reservoir No. 2 from January 1 to December 31 annually. The volume of stock water diverted to these reservoirs equals 2.55 AF. In addition, Permit 76H 72226-00 provided evaporative losses of 11.9 AF from Reservoir No. 2 and utilized Reservoir No. 2 for irrigation storage and pumping. These uses will continue in new Reservoir No. 1 and existing Reservoir No. 2. The Applicant's surface water irrigation rights from Barley and Canyon Creeks, Claims 76H 2508-00 and 76H 2509-00, will also be conveyed through new Reservoir No. 1 and existing Reservoir No. 2 for irrigation purposes. The period of diversion for these rights is April 15 to October 19 annually, however the Applicant provided information stating that the Canyon Creek water right only lasted until mid-July

typically. The Applicant proposes to utilize Reservoir No. 2 as a central pumping station for all irrigation within the places of use for Permit 76H 72226-00 and Claims 76H 2508-00 and 76H 2509-00. For the Barley and Canyon Creek water rights no water is proposed to be stored for later use, rather water from these sources will be pumped out of Reservoir No. 2 at the same rate it enters, and the reservoirs will be operated as a flow through system for these rights.

23. Historical Reservoir No. 3 will be relocated and renamed Reservoir No. 1. The proposed surface area for post-change Reservoir No. 1 is 0.59 acres, with a depth of 8 feet and a capacity of 2.36 AF. Historical Reservoir No. 3 has a surface area of 0.80 acres and a capacity of 3.2 AF. The relocation of Reservoir No. 3 and renaming to Reservoir No. 1 will result in a reduction of surface acres of 0.21 acres ($0.8 \text{ acres} - 0.59 \text{ acres} = 0.21 \text{ acres}$) and a difference of evaporated losses (consumptive use) of 0.74 AF. Historical Reservoir No. 1 (on-stream) will be eliminated, resulting in a reduction of 1 AF of historic consumptive use from evaporated losses. There will be no expansion of water consumption resulting from the proposed place of storage changes.

24. The relocation of the irrigation pump from the on-stream reservoir to the concrete weir/sluicelox will result in the Applicant increasing their diversion at the historical Sawdust Creek headgate diversion structure. Historically 150 GPM was diverted for fish and wildlife use in Reservoir Nos. 2 and 3. With the irrigation pump moving from the on-stream reservoir to the Sawdust Creek headgate, the Applicant will now divert 210 GPM at this location for fish and wildlife purposes and irrigation. The historical pump site was located approximately 300 feet downstream of the headgate. There are no intervening water users in this reach that could be adversely affected, and the total flow rate diverted from Sawdust Creek for fish and wildlife and irrigation is not increasing from historical practices.

25. To ensure there is no expansion of flow rate or diverted volume the current measurement condition in effect on Change Authorization 76H 30012733 will be required for this proposed change. Measurement devices will be installed at the headgate on Sawdust Creek to ensure the post-change diverted flow rate and volume do not exceed the historic flow rate of 210 GPM and diverted volume of 199.6 AF. The measurement condition reads as follows:

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE

SUBMITTED BY JANUARY 31 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR UNTIL THE BENEFICIAL WATER USE PERMIT IS PERFECTED AND THE DEPARTMENT RECEIVES A PROJECT COMPLETION NOTICE. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY

26. The existing headgate used by the Applicant is operational and can be shut off in the instance a call for water is made. Permit 76H 15711-00 is the most junior water right on Sawdust Creek, however, the Applicant's diversion is the furthest downstream on the source and has not been subject to call from other Sawdust Creek water users.

27. The Department finds there will be no adverse effect to other water users resulting from the proposed change in place of storage and correction of point of diversion legal land description under the terms and conditions set forth in this Preliminary Determination.

BENEFICIAL USE

FINDINGS OF FACT

28. The Applicant is not proposing to change the volume or flow rate of water historically used, and the irrigation place of use and purpose are not changing.

29. The Applicant proposes to relocate and rename Reservoir No. 3 with Reservoir No. 1(FOF 23) and convey water diverted from Sawdust Creek for the fish and wildlife purpose directly into new Reservoir No. 1 before secondarily conveying water to reconfigured Reservoir No. 2. Although no Sawdust Creek irrigation water will be diverted into Reservoir Nos. 1 and 2 under this provisional permit, the overall purpose of the project is to improve the irrigation infrastructure on the property by creating a centralized pumping reservoir (Reservoir No. 2) for sprinkler irrigation for associated Permit 76H 72226-00 and Claims 76H 2508-00 and 2509-00. The Applicant is not proposing to change the irrigation place of use for Permit 76H 15711-00, and water for irrigation of the 5-acre place of use will be diverted out of the Sawdust Creek headgate and conveyance system prior to water entering the pipeline to new Reservoir No. 1.

30. The Applicant will continue to use 150 GPM up to 189.1 AF of water for fish and wildlife purposes, and 60 GPM up to 10.5 AF for irrigation of 5 acres.

31. The Department finds the elimination of historical on-stream Reservoir No. 1, relocation and renaming of Reservoir No. 3 with new Reservoir No. 1, and reduction in size of Reservoir No. 2 for fish and wildlife and irrigation purposes to be beneficial uses of water.

ADEQUATE DIVERSION

FINDINGS OF FACT

32. The Applicant's current (and historical) primary Sawdust Creek diversion structure is a 30" concrete weir/sluiibox on Sawdust Creek with a headgate and slidegate sized to an 8-inch pipeline. The Applicant submitted specifications for an 8-inch pipe indicating it can convey up to a flow rate of 943 GPM, which has an adequate capacity to accommodate the permitted fish and wildlife flow rate and volume. This pipeline will convey a flow rate of 150 GPM and volume of 189.1 AF of fish and wildlife surface water from Sawdust Creek (Permit 76H 15711-00) to new Reservoir No. 1. From Reservoir No. 1 water is then conveyed via an open ditch approximately 300 feet east to Reservoir No. 2.

33. The Applicant will place a 60-GPM pump in the concrete weir/sluiibox to divert water for continued handline sprinkler irrigation of the 5-acre place of use, which is not changing. This pump site is located off of Sawdust Creek in the Applicant's conveyance system and is considered a secondary point of diversion. The Applicant submitted information indicating that the pump is a Model 2P5X and has 2-inch discharge and can produce 60 GPM. Portable 2-inch pipe will be run from the pump site on Sawdust Creek to the 5-acre place of use and irrigated via portable handlines, set in two separate 60x40 sets. Each set will have approximately four sprinklers and have 11/64 nozzles, which require 5-6 GPM each, or a total requirement of 20-24 GPM per set.

34. The Department finds the means of diversion, construction, and operation of the appropriation works are adequate for the beneficial use of irrigation of 5 acres and fish and wildlife use in two places of storage.

POSSESSORY INTEREST

FINDINGS OF FACT

35. The Applicant signed the affidavit on the application form affirming the Applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

HISTORIC USE AND ADVERSE EFFECT

36. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)(“quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only”); Town of Manhattan, at ¶ 10 (an appropriator's right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).¹

37. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions

¹ DNRC decisions are available at:

http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp

substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11, 103 P.2d at 1072-74; Matter of Royston, 249 Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.²

38. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.³ A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow);

² See also Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979); Lokowich v. Helena, 46 Mont. 575, 129 P. 1063(1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); and, Gassert v. Noyes, 18 Mont. 216, 44 P. 959(1896)(change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff’s subsequent right).

³A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under §85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. §85-2-234, MCA

Hohenlohe, at ¶44-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); Matter of Application For Beneficial Water Use Permit By City of Bozeman, *Memorandum*, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9, 1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).⁴

39. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶44; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909);

⁴ Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)(“[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right.”); Santa Fe Trail Ranches Property Owners Ass’n v. Simpson, 990 P.2d 46, 55 -57 (Colo., 1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)(“We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation”); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo., 1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G76l By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); ARM 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).⁵

40. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

41. In Royston, the Montana Supreme Court confirmed that an applicant is required to prove lack of adverse effect through comparison of the proposed change to the historic use, historic consumption, and historic return flows of the original right. 249 Mont. at 431, 816 P.2d at 1059-60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent appropriators as they relate to the adverse effect analysis in a change proceeding in the following manner:

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the “amount historically

⁵ The Montana Supreme Court recently recognized the fundamental nature of return flows to Montana’s water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell’s flows are fed by irrigation return flows available for appropriation. Bitterroot River Protective Ass’n, Inc. v. Bitterroot Conservation Dist. 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, ¶¶ 22, 31,43, 198 P.3d 219, ¶¶ 22, 31,43(citing Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

consumed” and the water that re-enters the stream as return flow. . . .

An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law-that an appropriator has a right only to that amount of water historically put to beneficial use-developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights.

This fundamental rule of Montana water law has dictated the Department’s determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use.

We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

Hohenlohe, at ¶¶ 42-45 (internal citations omitted).

42. The Department’s rules reflect the above fundamental principles of Montana water law and are designed to itemize the type evidence and analysis required for an applicant to meet its burden of proof. ARM 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. ARM 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. ARM 36.12.1901 and 1903.

43. While evidence may be provided that a particular parcel was irrigated, the actual amount of water historically diverted and consumed is critical. E.g., In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., DNRC Proposal for Decision adopted by Final Order (2005). The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full service irrigation for optimum plant growth. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. See MacDonald, 220 Mont. at 529, 722 P.2d at 604; Featherman, 43 Mont. at 316-17, 115 P. at 986; Trail’s End Ranch, L.L.C. v. Colorado Div. of Water Resources 91 P.3d 1058, 1063 (Colo., 2004).

44. The Department has adopted a rule providing for the calculation of historic consumptive use where the applicant proves by a preponderance of the evidence that the acreage was historically irrigated. ARM 36.12.1902 (16). In the alternative an applicant may present its own evidence of historic beneficial use. In this case Applicant has not elected to proceed under ARM 36.12.1902. (FOF No.13).

45. If an applicant seeks more than the historic consumptive use as calculated by ARM 36.12.1902 (16), the applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case. E.g., Application for Water Rights in Rio Grande County 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., supra; Orr v. Arapahoe Water and Sanitation Dist. 753 P.2d 1217, 1223 -1224 (Colo., 1988)(historical use of a water right could very well be less than the duty of water); Weibert v. Rothe Bros., Inc., 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo. 1980) (historical use could be less than the optimum utilization “duty of water”).

46. Based upon the Applicant’s evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Beneficial Water Use Permit No. 76H 15711-00 of 199.6 AF diverted volume and 210 GPM flow rate with a consumptive use of 10.63 AF. (FOF Nos. 9-20)

BENEFICIAL USE

47. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§ 85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: “[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . .” McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under § 85-2-402, MCA, and new beneficial permits under § 85-2-311, MCA. ARM 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519,

Montana First Judicial District Court (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)("The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes."); § 85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

48. Applicant proposes to use water for irrigation and fish and wildlife which are recognized beneficial uses. § 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence fish and wildlife and sprinkler irrigation is a beneficial use and that 199.6 AF of diverted volume and 210 GPM flow rate of water requested is the amount needed to sustain the beneficial use § 85-2-402(2)(c), MCA (FOF Nos. 28-31)

ADEQUATE MEANS OF DIVERSION

49. Pursuant to § 85-2-402 (2)(b), MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. This codifies the prior appropriation principle that the means of diversion must be reasonably effective for the contemplated use and may not result in a waste of the resource. Crowley v. 6th Judicial District Court, 108 Mont. 89, 88 P.2d 23 (1939); In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC (DNRC Final Order 2002)(information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate).

50. Pursuant to § 85-2-402 (2)(b), MCA, applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF Nos. 32-34)

POSSESSORY INTEREST

51. Pursuant to § 85-2-402(2)(d), MCA, the Applicant must prove by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See also ARM 36.12.1802

52. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF Nos. 35)

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 76H 30148403 should be granted subject to the following.

The Applicant is authorized to change the location of a fish and wildlife reservoir from the NWNWNE of Section 35, T6N, R21W to the E2E2NW of Section 35, T6N, R21W. The new reservoir (No. 1) will have a capacity of 2.36 AF. The Applicant is also authorized to remove an existing 5 AF capacity on-stream reservoir (historically No. 1) located on Sawdust Creek in the SWSENE of Section 35, T6N, R21W, and to reconfigure an existing fish and wildlife reservoir (No. 2) located in the S2NWNE of Section 35, T6N, R21W, by reducing its capacity to 28.5 AF. This authorization also corrects the point of diversion legal land description for the Applicant's existing Sawdust Creek headgate to the SWSENE of Section 35, T6N, R21W, all in Ravalli County. Using this headgate, the Department authorizes a diversion of 210 GPM up to 199.6 AF for continued fish and wildlife use in two reservoirs (150 GPM) and irrigation of 5 acres (60 GPM) located in the NW of Section 35, T6N, R21W, Ravalli County.

This change authorization will be subject to the following measurement condition:

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY JANUARY 31 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR UNTIL THE BENEFICIAL WATER USE PERMIT IS PERFECTED AND THE DEPARTMENT RECEIVES A PROJECT COMPLETION NOTICE. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the Application with such conditions as the Department decides necessary to satisfy the applicable criteria. E.g., §§ 85-2-310, -312, MCA.

DATED this 9th day of February 2023.

/Original signed by Jim Nave/
Jim Nave, Manager
Missoula Regional Office
Department of Natural Resources
and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 9th day of February 2023, by first class United States mail.

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